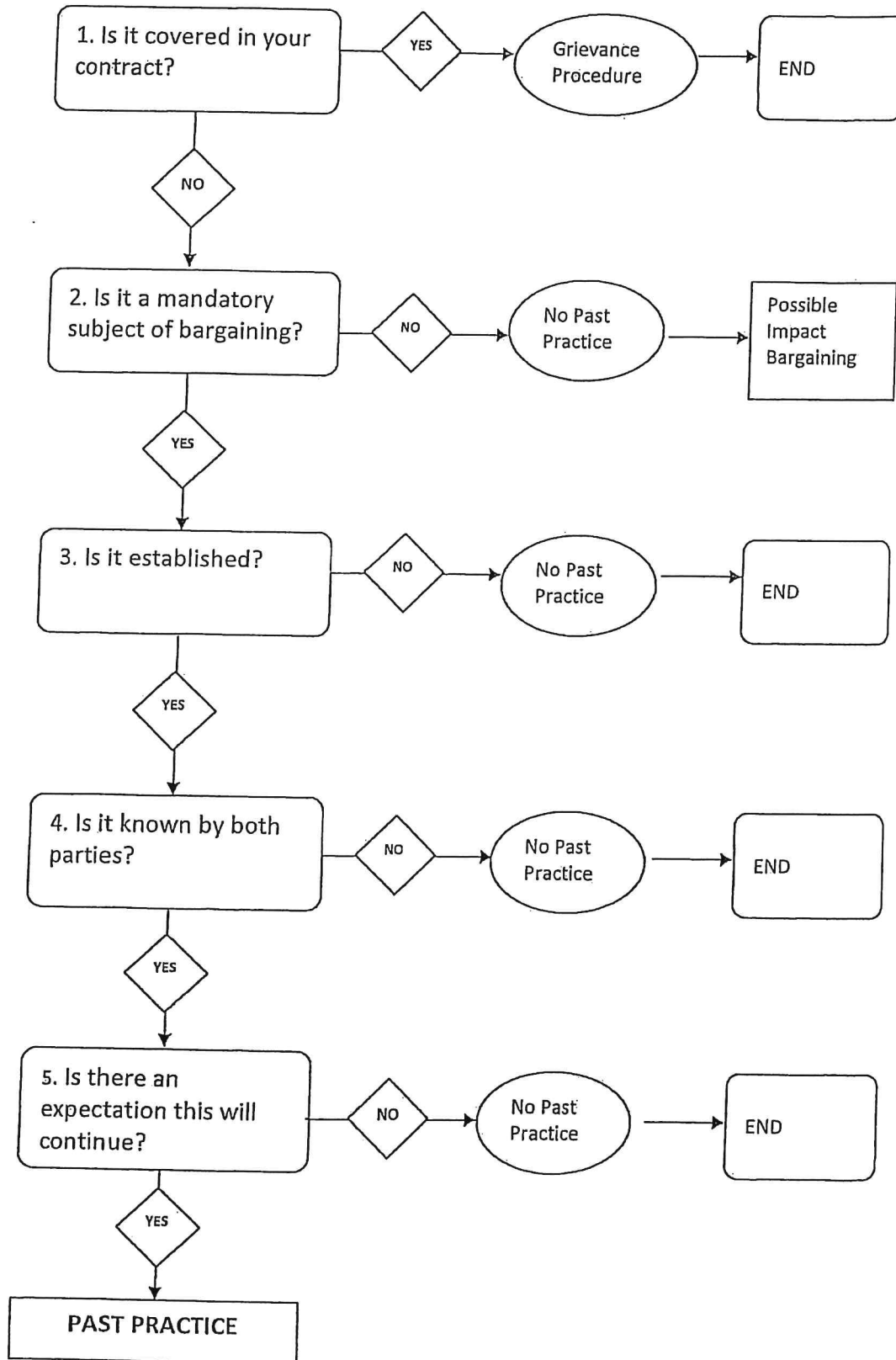


Section 5  
The Union Rep's Tools  
Past Practice



# Past Practice Flowchart



## Past Practice Flow Chart

### 1. Is it covered in your Contract?

If Yes, then PERB has no jurisdiction to entertain a Past Practice Improper Practice charge that is covered by a contract. You will have to proceed to the grievance procedure in your collective bargaining agreement.

### 2. Is It a Mandatory Subject of Negotiations?

Mandatory Subjects are those matters related to working conditions. The employer must negotiate these items and a Past Practice Charge must involve a Mandatory Subject. PERB determines what are Mandatory Subjects of Bargaining.

Non-Mandatory Subjects are those matters that relate to the employer's mission and are thus employer prerogatives. The employer does not have to negotiate these items (but may nevertheless choose to do so) and they are therefore not subject to a Past Practice Charge.

### 3. Is it Established?

There is no set number of times something must occur before it becomes a Practice. It will depend upon the issue. However, to succeed in a Past Practice Charge, you must be able to prove that the matter involved is clearly established.

### 4. Knowledge by both Parties?

Both Parties must have knowledge that the Past Practice you are attempting to prove has been in existence. Knowledge must be to the appropriate bargaining agent for both the employer and the union.

### 5. Expectation to Continue?

There must be a reasonable expectation that the Practice in question will continue.

## Past Practice Evidence in Arbitration

### A. Definition of Past Practice –

- a reasonably uniform response –
- to a recurring situation,
- which has occurred over a reasonable period of time,
- and which the parties acknowledge, implicitly or explicitly, as the appropriate response to a particular situation.

In order to prove that a binding past practice exists, all of the following factors must be proven:

- (1) The practice must be unequivocal - *meaning that the practice is clear and not subject to several interpretations;*
- (2) The practice must be clearly enunciated and acted upon- *meaning that it is well established and that it has occurred openly and freely in the workplace.*
- (3) The practice must be readily ascertainable over a reasonable period of time as a fixed, and established practice-
- (4) The practice must be mutually accepted by both parties- *meaning that both parties know about the practice and accept it as the established way of doing things.*

B. How Past Practice Evidence is Used to Interpret or Enforce Collective Bargaining Agreements.

- *as an aid to interpret ambiguous contract language;*
- *To prove a "term and condition of employment" when the contract is silent; or*
- *(In very rare occasions)-to modify or contradict clear contract language.*

1. The Use of Past Practice As An Aid To Interpret Ambiguous Contract Language

When contract language can be interpreted in more than one way, the language is said to be *ambiguous*. When contract language is ambiguous, Arbitrators will try to determine the parties' intent by examining other evidence outside the contract. The evidence most frequently used by arbitrators is the parties' bargaining history and past practice.

When past practice is used to interpret ambiguous contract language, the practice itself becomes a part of the Agreement, and like the written language that it helps to clarify, it can only be changed through negotiations - by negotiating a change in the underlying contract language or by negotiating a change in the practice itself.

*Q: Can you grieve a violation of a past practice that is rooted in ambiguous contract language?*

*A: Yes. A violation of a past practice that is rooted in ambiguous contract language is a violation of that contract provision, and would be enforced through the grievance procedure.*

## 2. The Use of Past Practice When the Contract Is Silent

If there is no language in the Agreement which covers the situation, but there is a clearly established past practice, the practice is as binding on the parties as if it were written into the Agreement. The past practice then effectively becomes a "term and condition of employment" that may not be unilaterally changed or eliminated during the term of the Agreement.

*Example: There was no contract language regarding summer school in the contract. However, the long standing past practice had been that qualified unit members would be given priority for summer school positions over outside applicants and that all applicants would be interviewed prior to the District making its final decision on hiring for summer school.*

*When the District filled its summer school positions without interviewing two unit members who had applied for summer school positions, it violated the long-standing past practice of interviewing all applicants prior to making its final selection for hiring.*

*Q: If there is no contract language that governs a particular situation, but you have a past practice that applies, can you grieve a violation of that past practice?*

*A: It depends. If there is no contract language that governs the situation, then you may only grieve the past practice if your grievance definition specifically allows you to grieve a violation of a past practice or if it allows you to grieve changes in the "terms and conditions of employment".*

*You may grieve a past practice if you have a grievance definition similar to this:*

*Example: A grievance is a claim based upon an event or condition that affects the welfare and/or terms and conditions of employment of a unit member or group of unit members or the Association, and/or affects the interpretation, meaning or application of any of the provisions of this Agreement.*

*But, you may not grieve past practices if you have a grievance definition similar to this:*

*Example: A grievance is defined as an alleged violation, misinterpretation, or inequitable application of a specific Article or Section of this Agreement.*

If your grievance definition does not allow you to grieve a violation of a past practice, then the only way to challenge a violation of the past practice is to file an Improper Practice Charge at PERB.

Q. *If there is no contract language that governs a particular situation, but the parties have a clear and binding past practice that covers the situation, can one party unilaterally decide to terminate or discontinue the past practice?*

A. *Yes, so long as the party who wants to discontinue the past practice gives notice to the other party during negotiations that it intends to discontinue the past practice. This notice would then effectively terminate the past practice when the current contract expires. The party could not terminate the practice in mid-contract.*



### 3. The Use of Past Practice to Amend or Contradict Clear Contract Language

In the event of a conflict between the language of the agreement and a past practice, the language in the Agreement will almost always prevail.

In these types of cases, the party who wants to bring in the past practice evidence has two hurdles to overcome.

The first hurdle is that the parole evidence rule, (a rule of evidence), which does not allow a party to bring in extraneous evidence - usually past practice or bargaining history - to contradict or clarify clear and unambiguous contract language. So if the contract language is *clear and unambiguous, even though you may claim that there is a valid and binding past practice*, most Arbitrators will not even allow you to present this evidence because it would violate the parole evidence rule.

However, many arbitrators are less strict about the rules of evidence in arbitration cases and so they may allow you to bring in evidence of a past practice "for what its worth".

Assuming that the Arbitrator allowed you to bring in evidence of a past practice that contradicted the clear contract language, you would then have a second hurdle to overcome, which is that the Arbitrator must now determine whether the parties actually intended that the practice would override the contract language that they drafted and agreed to.

In such a case, when the past practice runs counter to or contradicts the plain meaning of the contract's words, an arbitrator will usually deem the practice to be merely a "benefit" granted by one party to the other, and not an actual past practice, which constitutes a term and condition of employment.

C. Factors Considered in Determining Whether a Binding Past Practice Exists.

Arbitrators frequently examine the following factors in order to determine whether a binding past practice exists.

- (1) *the frequency of the practice;*
- (2) *the consistency of the practice;*
- (3) *the longevity of the practice;*
- (4) *the circumstances surrounding the creation of the practice;  
and*
- (5) *whether the practice has been discussed in negotiations or during the grievance and arbitration process, and if so, in what context.*

1. The Frequency of the Practice

The more times the conduct has been repeated, the stronger the past practice evidence. This is because the longer the practice, the stronger the implication that such conduct represents the parties' mutually accepted way of doing things.

But, in certain circumstances, even a single instance can constitute a past practice, particularly where the single instance was significant, or involved a situation that did not occur frequently.

For example: If the contract language stated:

*If school is closed for an emergency, salaried employees who are sent home shall be paid for the day. Hourly employees who are sent home shall be paid for the number of hours that they had been scheduled to work on that day.*

Generally, this provision had only been used when *the whole school* had been closed down. But in *one instance*, when there had been a water-main break in the *elementary school*, only the elementary school employees had been sent home, but everyone in the elementary school – hourly and salaried employees - had been paid for their regularly scheduled hours on that day.

Several years later, under a new administration, when there was a hazardous spill at the *middle school* and only the middle school employees were sent home, the Union was able to use the one instance past practice to successfully prove to the Arbitrator that the hourly employees in the *middle school* were entitled to be paid for their regularly scheduled hours on that day.

In general, Arbitrators will only consider a single instance of behavior to constitute a valid and binding “past practice” if such practice is used to interpret an *ambiguous clause* in the contract.

They will not consider a single instance of behavior to constitute a valid and binding “past practice” if the contract language is silent about such issue.

## 2. The Consistency of the Practice

Consistency refers to the extent that the practice has been applied to the members of the bargaining unit. Arbitrators will generally give greater weight to a past practice that has been uniformly applied to all or most members of a unit versus a more limited past practice that was developed in response to the problems of particular members of a bargaining unit or members in certain locations.

### 3. The Longevity of the Practice

The longer the practice has been followed, the more weight Arbitrators will accord it. This is particularly true if the alleged past practice spanned a number of collective bargaining agreements and neither party proposed changing the past practice during negotiations. In such cases, arbitrators will infer that the parties' intended that the past practices would continue when they re-negotiated their agreement.

### 4. The Circumstances Surrounding the Creation of the Practice

A past practice may not be divorced from the circumstances that led to its creation, and a change in the circumstances that formed the basis of a past practice permits either party to discontinue that past practice.

Thus, a past practice that is used to help interpret ambiguous contract language may be discontinued if the contract language has changed or if the circumstances surrounding the practice have changed.

*Example A: The Employer shall provide parking for all employees.*

The Employer unilaterally discontinued a long-standing practice of providing employees with free parking when its operations were moved to a downtown location where free parking was no longer available. The Union grieved, and requested reimbursement of all the employees' parking fees incurred since the move.

The Arbitrator denied the grievance, claiming that the past practice could no longer be upheld because the absence of a free parking area next to the employer's new location constituted changed circumstances.

Since there was no indication that the parties' intended that the Employer should have to provide parking to the employees regardless of the cost, the Arbitrator held that the past practice must be limited to the circumstances from which it arose; namely – a free parking area next to the Employer's location.

But, a past practice may continue to be binding despite the fact that the circumstances surrounding the creation of the practice have changed, if the practice has been continued for a reasonable amount of time after the circumstances have changed without objection by either side. In such a case, Arbitrators will infer that the parties' mutually agreed to continue the practice.

#### 5. Discussions in Negotiations about a "past practice"

Bargaining history often provides valuable insight into how the parties' view a particular "past practice". Generally, if one side presents a proposal in negotiations to change or eliminate a "past practice", this is a good indication that the parties consider the practice to be a term and condition of employment that cannot be unilaterally changed without negotiation.

But, a past practice that is grounded in *ambiguous contract language* will remain in full force and effect unless the parties negotiate a change in the underlying contract language or in the past practice itself.

But, if there is no contract language that governs a particular situation (and you have a "stand alone" past practice), the practice may be terminated by one side giving notice to the other side during negotiations that the practice will no longer continue.<sup>1</sup>

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<sup>1</sup> This is true provided that the parties do not have a "maintenance of benefits" clause in the contract. If there is such a clause, then the past practice is enforceable by grieving a violation of the maintenance of benefits

D. The “Management Functions/Working Conditions” Test

A Management Right is anything that affects the employer’s mission, or which relates to the extent of services to be rendered to the public, or to the manner or means of providing those services.

A “past practice” that concerns a “Management Right” may be changed or modified at any time by Management. (These are not true past practices).

A past practice that concerns a “term and condition of employment” may not be changed unilaterally, but must be negotiated.

*Example: The Employer will not schedule employees for weekend work without advance notice.*

The “past practice” had been that Management would notify an employee by Thursday if it were to require employees to work on the weekend. When Management began to schedule employees for weekend work on Fridays, the Union objected claiming that Management had violated the long standing past practice of scheduling weekend work by Thursday.

Because the scheduling of employees is an exclusive right of Management, an Arbitrator would most likely rule that notifying the employees by Thursday was not a true “past practice”, but merely a courtesy that Management had extended to the Union. And therefore, Management was within its rights when it changed the notification day from Thursday to Friday.

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clause, and the only way to terminate the practice is to negotiate a change the maintenance of benefits clause or in the past practice itself.

### E. The "Employee Benefit/Gratuity" Test

Under the "Employee Benefit/Gratuity" Test, the Arbitrator must decide whether a claimed "past practice" (that is not grounded in ambiguous contract language) is an employee benefit or merely a gratuity provided by the Employer. If the Arbitrator ascertains that the practice was a "mere gratuity," then it is not really a true "past practice" and the Employer may unilaterally discontinue it at any time. If however, the practice is considered to be an employee "benefit", then the Employer cannot unilaterally change or discontinue the practice unless it notifies the union during negotiations that it wishes to terminate the practice.

*Some factors that are useful in determining whether a practice is a benefit or a gratuity are:*

1. Whether the item was unilaterally provided by the Employer, or was only provided after discussions or negotiations with the Union;
2. Whether the item has only been provided to employees conditionally- i.e.- if profits were high or if the budget was passed;
3. The dollar value of the item and whether the amount of the item has remained constant over time or has been modified unilaterally by the Employer;
4. Whether the item has been treated as "income" or "wages" for purposes of taxes;
5. Whether the item has been consistently provided, and if so, for how long;

## F. The Impact of a Maintenance of Benefits Provision on Past Practices

A maintenance of benefits provision is a contract provision that expressly states that past practices will be maintained for the term of the agreement.

When an agreement contains a maintenance of benefits clause, the parties' past practices, (that are not grounded in ambiguous contractual provisions), will remain in full force and effect so long as the maintenance of benefits provision remains in the contract, or until both parties agree that a particular practice will no longer continue.

The following are various examples of maintenance of benefits clauses:

- *This Agreement shall not be interpreted or applied in any manner that will deprive teachers of professional benefits of employment heretofore enjoyed.*
- *The Board agrees that all past practices of the parties shall be maintained during the term of this Agreement.*
- *The District agrees that it shall negotiate with the Association before it changes any practice or policy that directly or indirectly affects the members' terms and conditions of employment.*

In a contract without a maintenance of benefits clause, all that is required to terminate a past practice is for one side to give notice during negotiations that a past practice will no longer continue.

However, in a contract with a maintenance of benefits clause, in order to terminate the past practice, the parties must either negotiate a change in the maintenance of benefits language or in the past practice itself.



## G. The Impact of a Zipper Clause on Past Practices

A Zipper clause is a clause that attempts to “zip up” any loose ends contained in an agreement. Such a clause is often manifested by contract language to the effect that:

*It is the intent of the parties that this written Agreement will supersede all prior agreements, understandings, and practices, whether oral or written, express or implied, between such parties and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise.*

Q. *How does a zipper clause affect past practices?*

A. *It depends. Arbitrators will look at the totality of the circumstances to determine what effect a zipper clause will have on the parties' past practices. Some of the things arbitrators will look at are whether the zipper clause is a specific or a general clause and/or whether the past practice has continued despite the inclusion of the zipper clause in the Agreement.*

Some Arbitrators have interpreted contractual zipper clauses as not eliminating the past practice unless the zipper clause expressly mentioned the term “past practice.”

Other Arbitrators however, have treated zipper clauses as a clear indication that the parties were not obligated to continue the past practice (unless it was one that was rooted in ambiguous contract language).

